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Supreme Court of the United States

October Term, 1965

No.

JOSEPH E. SEAGRAM & SONS, INC., *et al.*,
Appellants,
v.

DONALD S. HOSTETTER, Chairman, JOHN C. HART,
WALTER C. SCHMIDT, BENJAMIN H. BALCOM,
ROBERT E. DOYLE, constituting the State Liquor Authority, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

Appellees move to dismiss appellants' appeal upon the ground that there is not presented any substantial federal question.

Statement of the Case

The action, brought by distillers and wholesalers of alcoholic beverages, sought judgment declaring invalid two provisions of a 1964 general amendment (Chapter 531 of the Laws of 1964) of the Alcoholic Beverage Control Law of the State of New York*. The sections challenged are

* The Alcoholic Beverage Control Law regulates the sale of alcoholic beverages within the State of New York. Those trafficking in alcoholic beverages in the state are required to be licensed and the provisions for licensing are contained in this Law.

§ 9 of chapter 531 and certain provisions of § 7, subdivision 3 (a). The text of these provisions is set forth in full in Appendix D hereto.

The concentration of plaintiffs' attack is and has been throughout on § 9.

Section 9 requires that as to the monthly schedules of brand owners', distillers' or manufacturers' prices to wholesalers, and of wholesalers' prices to retailers which schedules, since 1942, are required under the Alcoholic Beverage Control Law to be filed for the ensuing month, there now must be filed an affirmation verified by the brand owner that the brand price in the schedules is not higher than the lowest price at which the same item was sold by the brand owner or wholesaler designated as agent or by a related person,* in the United States outside the State of New York, in the month preceding that in which the schedule is filed.

Two provisions of § 7 of the 1964 statute which plaintiffs attack are the following: The provision which requires price schedules to contain the bottle and case price paid by the seller. Necessarily this means the bottle and case price when the seller has *paid* a bottle and case price.

The other is that which provides that the prohibition against sale to or purchase by a wholesaler, unless price schedules are filed, applies "irrespective of place of sale or delivery". Necessarily this affects only wholesalers licensed to sell in New York (Alcoholic Beverage Control Law § 105[16]), sale to or purchase by wholesalers for resale in New York, and schedule of prices within New York State. The words "irrespective of place of sale or delivery" serve to eliminate any contentions that sale is not in

* Related person is defined in the statute, § 9 ¶ 3 subdivisions d and f.

New York when a New York wholesaler takes delivery at out-of-state distilleries (See *infra* pp. 10-11).

Prior to the general amendment of the Alcoholic Beverage Control Law of the State of New York in 1964 in which §§ 9 and 7 were contained, there had in 1963 been a Moreland Commission appointed by Governor Rockefeller to undertake a "thorough study and reappraisal of the [New York Alcoholic Beverage Control] Law with respect to the sale and distribution of alcoholic beverages in the State, to examine and investigate * * * the methods and practices of manufacturers, distributors and retailers of alcoholic beverages in the State" and to propose any revisions of the law which might be found necessary "in the light of experience and current social and economic conditions" (Executive Order February 15, 1963).

The Moreland Commission found* that prices to wholesalers and retailers in New York State were so much higher than they generally were outside New York State that many retail prices to consumers elsewhere were lower than the prices paid by retailers to wholesalers in New York. The Moreland Commission also found that cost of alcoholic beverages had no relation to temperance; that high prices did not reduce the volume of consumption of alcoholic beverages; low prices did not increase it. It was found that all that high prices did was benefit the brand owners and exploit the consumer. To eliminate such discrimination and exploitation, § 9 was enacted with the goal of bringing New York prices to wholesalers and retailers down and thus make it possible for prices to consumers to be reduced. Such prices it had been found were \$1 to \$1.50 a fifth higher

* Moreland Commission Report No. 3; Interim Report; Study Paper No. 5.

in New York State than they are for the most part outside New York State.

Decisions of the New York Courts

The statutory provisions attacked were upheld by the New York State Supreme Court (where the action was commenced); by the New York State Appellate Division (unanimously); and by the New York Court of Appeals (three Judges dissenting). The opinion of the New York Supreme Court, Special Term, Albany County (Appendix C hereto) is reported at 45 N. Y. Misc. 2d 956, 258 N. Y. S. 2d 442. The opinion of the New York Supreme Court, Appellate Division, Third Department (Appendix B hereto) is reported at 23 N. Y. A. D. 2d 933, 259 N. Y. S. 2d 644. The opinion of the Court of Appeals and the dissenting opinion (Appendix A hereto) are reported at 16 N. Y. 2d 47, 262 N. Y. S. 2d 75.

ARGUMENT

The case presents no substantial federal question. The questions appellants urge as meriting consideration by this Court either are conclusively foreclosed by prior decisions of this Court or do not raise a question of constitutional substance.

We shall take up each question listed in appellants' Jurisdictional Statement (pp. 5-6) and show that it does not present a substantial federal question meriting this Court's taking jurisdiction of this appeal.

A. Questions 1 and 3—21st Amendment and the Commerce Clause.

We suggest that in their first question appellants are not setting forth a question of validity of the statute involved

under the Twenty-first Amendment, but making an argument premised on their contentions of the impact of the statute. Accurately, it is submitted, the question is:

May the State of New York under the Twenty-first Amendment to the Constitution of the United States enact a statute that requires in substance that brand owners of alcoholic beverages (who must be licensed by the State in order to sell their products within the State and are regulated by the State) must file verified affirmations, with the monthly schedules of prices required to be filed by brand owners and wholesalers, that the brand prices in New York State to wholesalers and retailers by the brand owner or by any person who has the status of related person to the brand owner, as defined by the statute, are no higher than the lowest prices at which such brands were sold in the preceding month in the United States outside New York State to wholesalers and retailers by the brand owners or by a related person.

This question was answered in the affirmative by the New York Courts. It is submitted that the decisions of this Court interpreting and applying the Twenty-first Amendment conclusively support such decisions by the New York Courts, and foreclose any controversy thereon.

Soon after the adoption of the Twenty-first Amendment this Court made clear that by virtue of its provisions the States are unconfined by traditional Commerce Clause limitations in respect to regulation of traffic in alcoholic beverages, its use, distribution, or consumption within State borders. *State Board v. Young's Market Co.*, 299 U. S. 59 (1936); *Mahoney v. Joseph Triner Corp.*, 304 U. S. 401 (1939); *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U. S. 391 (1939); *Joseph S. Finch & Co. v.*

McKittrick, 305 U. S. 395 (1939); *Ziffrin, Inc. v. Reeves*, 308 U. S. 132 (1939); *Carter v. Virginia*, 321 U. S. 131 (1944).

This Court has never departed from the principles of these decisions. In denying in 1958 a motion by the State of California to file an original bill of complaint against the State of Washington wherein it was alleged that Washington had erected trade barriers to the sale of California wine in Washington in violation of the Commerce Clause, this Court's *per curiam* opinion (*California v. Washington*, 358 U. S. 64) summarily disposed of the contention, citing as authority the Twenty-first Amendment and the Court's earlier decisions which we have noted *supra*, p. 5.

Appellants contend (Jurisdictional Statement, p. 25) that this Court has failed to endorse its earlier statements in respect to the breadth of the Twenty-first Amendment. On the contrary in—*Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 24 (1964), Mr. Justice STEWART, writing for the majority, reaffirmed in the clearest possible language the earlier interpretation by this Court of the Twenty-first Amendment (377 U. S. at p. 330):

“This Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders. * * *”

“This view of the scope of the Twenty-first Amendment with respect to a State's power to restrict, regulate, or prevent the traffic and distribution of intoxicants within its borders *has remained unquestioned*. See *California v. Washington*, 358 U. S. 64. * * *”
(Emphasis supplied.)

Similarly, in *Department of Revenue v. Beam Distilling Co.*, 377 U. S. 341, 346 (1964):

"There can surely be no doubt * * * of Kentucky's plenary power to regulate and control, by taxation or otherwise, the distribution, use or consumption of intoxicants within her territory after they have been imported."

Were the subject matter involved in this case not traffic in alcoholic beverages, that the law might have impact (as appellants assert it does) on appellants' operations outside the State of New York would not bring it into conflict with the Commerce Clause (*Oshorn v. Ozlin*, 310 U. S. 53, 62 [1940]; *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444-445 [1940]; *Hooperston v. Cullen*, 318 U. S. 313, 320-321 [1943]; *Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, 426-427 [1937]; *Watson v. Employers Liability Corp.*, 348 U. S. 66, 72, 73 [1954]).

B. Question 2—Sherman and Robinson-Patman Acts

The Sherman Act and Robinson Act are irrelative to the statute here. Therefore there is no issue under the Supremacy Clause of the Constitution.

The Sherman Act and the Robinson-Patman Act are both concerned with interstate as distinguished from intra-state commerce. Since § 9, as well as the other provisions of the Alcoholic Beverage Control Law of the State, regulate and control the sale and distribution of intoxicating beverages within the State of New York only, neither Act has any relevance or bearing in this case.

Moreover the statute does not act upon monopolistic or anti-competitive practices as does the Sherman Act. It is not an anti-monopoly statute. The Legislature of the State of New York found that New York consumers had been paying unjustifiably higher prices for liquor than consumers in other states. Section 9 was enacted in an effort by the Legis-

lature to end this discrimination by all major brand owners against the New York consumer.

There is thus no conflict between the New York statute and the Robinson-Patman and Sherman Acts, and the "teaching of this Court's decisions," as pointed out by Mr. Justice STEWART in *Huron Cement Co. v. Detroit*, 362 U. S. 440 (1960) "enjoin seeking out conflicts between state and federal regulation where none clearly exists." *Id.* at 446.

C. Question 4—Due Process Clause

Throughout appellants' argument upon their question four runs the contention that the "no higher than the lowest price" provision of § 9 does not affirmatively promote temperance and thus it is not a proper exercise of the police power because, they declare, all liquor legislation must promote temperance. But if we review the subject of state enactments upheld by this Court under the Twenty-first Amendment, appellants' thesis, and with it their argument of the substantiality of their due process question, fall.

In *State Board v. Young's Market Co.*, *supra*, a California statute which exacted a \$500. annual license fee for the privilege of importing beer from other states, obviously designed to protect local from foreign beer, was upheld.

In *Mahoney v. Joseph Triner Corp.*, *supra*, a Minnesota statute imposing additional processing conditions on liquor imported from other States was sustained, the Court noting that the statute "clearly discriminates in favor of liquor processed within the State as against liquor completely processed elsewhere." (304 U. S. at 403.)

Also held valid in *Indianapolis Brewing Co. v. Liquor Control Commission*, *supra*, and *Joseph S. Finch & Co. v.*

McKittrick, supra, were retaliatory laws enacted by Michigan and Missouri respectively, which prohibited the importation or sale of beer manufactured in a State discriminating against beer produced in Michigan (*Indianapolis Brewing Co.* case) or Missouri (*Finch* case). In the *Indianapolis Brewing* case, the contention that the Michigan statute violated the due process clause was summarily rejected. (305 U. S. at 304.)

Obviously the legislation upheld in these cases was not designed to promote temperance. Thus there is no merit whatsoever to appellants' argument that all liquor legislation must affirmatively promote temperance to be permissible under the Twenty-first Amendment.

Nor is there any merit to appellants' contention that police power legislation is valid only if designed to advance the health, safety and so on. This same argument was made in the *Young's Market* case, *supra* (299 U. S. 59, 63) and rejected by this Court on the ground that since the Twenty-first Amendment granted the States an unconditioned authority to prohibit totally the importation of intoxicants, it logically followed that any discriminatory restriction was equally valid, notwithstanding the absence of any connection between such restriction and public health, safety or morals. Section 9 was designed to protect the public welfare of the People of the State of New York who, as consumers, the Legislature found, were being discriminated against by having to pay an unjustifiably higher price for alcoholic beverages than consumers in other states.

The police power is not limited to enactments for protection of health, safety, morals and the like. It encompasses under the power of protection of the general welfare, the protection of the People from economic disad-

vantaging at the hands of business. Therefore, limitation of maximum prices by private industry is upheld by this Court (*Gold, et al. v. DiCarlo*, 380 U. S. 520 [1965], aff'g 235 F. Supp. 817, 820-821; *Townsend v. Yeomans*, 301 U. S. 441 [1937]; *Olsen v. Nebraska*, 313 U. S. 236 [1941]; *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U. S. 251 [1931]; *Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, 427 [1937].

With respect to the purely speculative and conjectural difficulties of compliance with § 9 which appellants argue, it is submitted that these asserted problems—if indeed there would be such—do not present the type of questions which will persuade this Court to take jurisdiction of a case as presenting a substantial federal question.

D. Question 5—Equal Protection Clause

Appellants' argument that there is a violation of equal protection in that the provisions of § 9 do not include certain dealers in alcoholic beverages in the State (Jurisdictional Statement, pp. 60-62) is completely answered by the principles that "the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same" (*Tigner v. Texas*, 310 U. S. 141, 147 [1940]), and that a statute is not rendered unconstitutional as violating equal protection because others might have been included within its coverage but were not (*Watson v. Maryland*, 218 U. S. 173, 179-180 [1918]).

E. Question 6—As to "certain parts" of Section 7

There is just no semblance of a constitutional question in respect to Section 7. Appellants' challenge to it (Jurisdictional Statement, pp. 63-64) is the creature of a forced construction of the section.

The highest Court of the State of New York has construed the provision contrary to appellants' construction of it, and so as to leave no vestige of possibility of any constitutional infirmity in it. (Court of Appeals Opinion, Appendix A; see also Judge STALEY's Opinion, Appendix C.) The construction of a State statute by the highest Court of the State of its enactment is accepted by this Court.

CONCLUSION

The appeal should be dismissed upon the ground that it does not present any substantial federal question warranting this Court taking jurisdiction, or the decision of the Court of Appeals of New York should be affirmed.

Dated: October 4, 1965.

Respectfully submitted,

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Appendix A**COURT OF APPEALS OF THE STATE OF
NEW YORK**

JOSEPH E. SEAGRAM & SONS, INC., & ors.,
Appellants,
vs.

DONALD S. HOSTETTER, Chairman, & ors., constituting the State Liquor Authority, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
Respondents.

Decided July 9, 1965.

BERGAN, J.

In 1963 in response to malfunctions in the administration of the State's liquor law and public dissatisfaction with controls on the sale of alcoholic beverages, the Governor appointed a Moreland Commission directed to make a "study and reappraisal" of the law.

In appointing the Commission the Governor noted that since the enactment of the Alcoholic Beverage Control Law in 1934, soon after the end of prohibition, there had been "no major reappraisal or revision of the law in the light of experience and current social problems and economic conditions".

The Commission addressed itself, among other things, to the price of liquor in New York and the effect of price on temperance in the use of liquor. One of the basic assumptions of the statute then in effect was that if the price of liquor were cheap, its consumption would increase and the policy effected by the statute was to sustain the price.

Former section 101-c of the Alcoholic Beverage Control Law had authorized a manufacturer who was a "brand" owner to fix the minimum retail prices for that brand, for the violation of which the retailer was subject to discipline by the State Liquor Authority (subd. 7). The statute (§ 101-b, subd. 3) had for over 20 years also provided for filing price schedules by brand owners and wholesalers.

The Commission's studies led it to believe that the assumed favorable relation of high priced liquor to temperance was chimerical. The prices of liquor in New York were high, but consumption had steadily risen and this did not indicate high prices increased temperance. It found "a greater than average" per capita consumption in New York (*Moreland Com. Report No. 1*, p. 3).

The principal benefit from the minimum price requirement for liquor in New York went to the liquor interests. This served "merely", said the Commission, "to insure profit margins of the various segments of the industry" (*Report No. 3*, p. 19, offered as Exh. E by plaintiffs at Special Term) and "the argument that high prices promote temperance in that they keep liquor out of the hands of those who should not have it" is "unfounded" (*id.*, p. 17).

Its studies showed no correlation between consumption and prices, looking at the experience in states in which prices were high compared with those in which they were low.

It found in effect gross price discrimination against the New York consumer by the industry. It developed that the retail price for a fifth of a well-known brand of liquor was lower in Washington, D. C. than the wholesale price in New York. One brand, for example, cost \$2.85 retail in Washington and \$3.45 wholesale in New York, another \$3.39 and \$4.15 respectively (see *Report No. 3*, pp. 5, 6).

This report adds: "For almost every fifth of whiskey that he buys, the New York consumer pays 50 cents to \$1.50 more than the price at which it is available in at least seven free price markets" (p. 78).

On the basis of these reports the Governor made recommendations to the Legislature (*Message*, February 10, 1964). He observed that the administration of the State's liquor law had been marked by "periodic instances of corruption and favoritism". He noted the favored position of the liquor industry in an area which was the subject of public regulation and that the Moreland Commission had reported "it is contrary to the public interest to have the regulated industry in such a dominant role". He added that the Commission had sought means of "Bringing justice to the consumer by putting to an end artificial devices whereby the liquor industry has received uniquely beneficial treatment at the consumer's expense."

The Governor also noted that as a result of the distiller-fixed consumer prices under the statute a "surcharge" had been "foisted on New Yorkers" of \$150 million a year over what would have been paid in a free market.

The result of the Commission study and the Governor's recommendations was the enactment of a statute by the Legislature (L. 1964, ch. 531) which, among other things, vitally changed the direction of liquor price policy in New York and sought to reduce consumer prices.

This suit is maintained by 62 distillers and wholesalers of alcoholic beverages and some importers against the State Liquor Authority and the Attorney General to declare the provisions of the 1964 statute invalid. The main attack is directed to section 9 of the statute; the other is directed to certain parts of section 7. The court at Special

Term in a comprehensive opinion granted judgment for defendants; the Appellate Division affirmed.

In changing the direction of its policy which had been to prevent prices from going too low by establishing effective devices pursuant to which the liquor industry could in effect fix minimum retail prices on brand liquors, the Legislature by section 9 of the 1964 statute set up means which sought to keep down the prices of brand liquors to the consumer. The mechanism is a simple one and it lies technically in the control of the liquor industry. But it is a mechanism to which plaintiffs take vigorous exception on a diversified number of grounds.

The provision is this: On filing the schedules of brand owners' prices to wholesalers, which for 20 years had to be filed monthly under the former provisions of section 101-b, the brand owner or his designee must file an affirmation "that the bottle and case price" to wholesalers in New York "is no higher than the lowest price at which such item of liquor" was sold the previous month to any wholesaler elsewhere in the country or any state or state agency operating a public liquor enterprise (§ 9).

Thus it was sought to end the discrimination by the liquor industry against the New York consumer which, as the Commission had found, cost the New York consumer 150 million dollars a year above that which a free market would have offered.

This change from a favored and protected profit position to a possibly sparse profit situation may make it economically difficult for the liquor industry. If it does it is within the competence of the New York Legislature to make it that way. Even without Article XXI of the United States Constitution, New York could end the liquor traffic within its borders entirely. The State of Mississippi, for example,

prevents the plaintiffs or anyone else from selling liquor there and no one doubts its power to do so. But the twenty-first amendment spells out an additional specific and federally-protected right of each state to eliminate as well as regulate the liquor traffic within its borders (*Mahoney v. Triner Corp.*, 304 U. S. 401).

A long history of regulation, control, price fixing, place of time and sale setting, and outright extinction lies behind the liquor business in this country since Colonial times, and it is too late today to suggest that the rights of those who choose to engage in it are on a constitutional or legal parity with the rights of people who trade in bicycles, or cosmetics, or furniture.

If the conditions set down by the Legislature are economically impossible for the liquor industry to meet, it will have to accept this impossibility. But we are of opinion they are not economically impossible and that the effect of the 1964 statute will be to reduce liquor profits and pass the benefit of some of them on to New York consumers.

In effect the dependence of the New York price on the maximum price of the distiller for his brand elsewhere is to tie the price in this State in to a national price. There is nothing unreasonable about that. It is not an interference with interstate commerce. The effect is on what the distiller charges here and is an effect closely associated with operations of the sale and distribution of liquor within the State.

That it reflects and depends on events outside the State does not condemn it. It could as well have been tied into the national average price of liquor; or the national cost of living index. It is a device to end a demonstrated discrimination against the New York consumer and it is a

device within the power of the State to employ in this regulated activity.

There is in the record proof offered at Special Term by plaintiffs in an exhibit (Exh. C attached to the affidavit of Thomas F. Daly) consisting of excerpts of the testimony before a legislative committee of Judge LAWRENCE E. WALSH, the Moreland Commissioner, who personally opposed the kind of regulation prescribed by section 9, in which the statement is made that in the liquor industry, "the whole sum total of that relationship averages out to a price that is average throughout the country".

He cited Pennsylvania, a monopoly state, "the largest purchaser of liquor in the world * * * (\$400,000,000 worth of liquor a year—one customer)" as being an example of a customer who insists "on the lowest price that the distiller offers anywhere in the country".

In the light of this kind of national marketing situation, the actual difficulty of the distiller in seeing to it that the New York buyer pays no more than "the lowest price" elsewhere seems greatly overstressed.

Under section 9 the distillers themselves control the base price since they fix the lowest price elsewhere. If its effect on New York is too low a price they have it within their power to raise the lowest price elsewhere. The industry must absorb any differential cost in doing business as one of the incidents to a highly regulated industry. The incidental effect of this on prices in another state do not invalidate the New York statute.

The requirement of section 9 is not, indeed, unusual in concept and those states which have state liquor monopolies, we are told, require the distillers to warrant that the price charged the State monopoly for brand liquors is no

higher than the price charged in other states. Thus we think the price regulation in the 1964 statute is neither impossible of compliance nor unreasonable.

It is thoroughly settled that when it comes to the regulation of liquor traffic a wide area of public power may be exercised in plenary fashion by State governments without Federal interference either under the commerce clause or under the equal protection provisions of the Constitution.

A leading decision is *State Board v. Young's Market Co.* (299 U. S. 59) where the court in an opinion by Mr. Justice BRANDEIS sustained a statute imposing a license fee for the privilege of importing beer from other states against the argument that it violated both the commerce clause and the equal protection clause.

In the same direction is *Mahoney v. Triner Corp.* (304 U. S. 401, *supra*) ; again in an opinion by Justice BRANDEIS the court sustained a Minnesota statute imposing additional processing conditions on liquor coming from other states, a statute which the court noted "clearly discriminates in favor of liquor processed within the State against liquor completely processed elsewhere" (p. 403).

Similarly discriminating statutes in Michigan which prohibited dealers in beer there from selling beer manufactured in other states which in turn discriminated against beer manufactured in Michigan (*Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U. S. 391) and to the same effect in Missouri (*Finch & Co. v. McKettrick*, 305 U. S. 395) were each sustained. The statute before us could scarcely be deemed to have as much impact on the plaintiffs' federal rights as these.

In *Ziffrin, Inc. v. Reeves* (308 U. S. 132) a Kentucky statute confining the transportation of liquor to licensed

common carriers was sustained, with Mr. Justice McREYNOLDS propounding the question: "Having power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants, was it permissible for Kentucky to permit these things only under definitely prescribed conditions?" And making the answer: "Former opinions here make an affirmative answer imperative."

As the Appellate Division opinion noted, nothing in the later decisions of the court upon which appellants mainly rely suggests that the basic power of New York to control the liquor traffic has been impaired. The holding of *U. S. v. Frankfort Distilleries* (324 U. S. 293) is merely that liquor producers, wholesalers and retailers may conspire unlawfully to fix prices in violation of the Sherman Act. Nothing in that decision sustains any part of plaintiffs' contention.

And *Hostetter v. Idlewild Liquor Corp.* (377 U. S. 324) and *Dept. of Revenue v. James Beam Co.* (377 U. S. 341) are irrelevant to the case before us. The principles announced in the earlier cases were reenforced in 1958 in the denial of the application of California to file a bill of complaint against Washington (*California v. Washington*, 358 U. S. 64).

On the general exercise of State powers in matters affecting the welfare of a State and its people, liquor aside, see *Hooperston Co. v. Cullen* (318 U. S. 313); *Huron Cement Co. v. Detroit* (362 U. S. 440); *Osborn v. Ozlin* (310 U. S. 53).

The provisions of section 9 are not transformed into an "anti-trust measure" in conflict with the supremacy clause on the basis of plaintiffs' conception that the statute is not "a device to promote temperance"; nor are they for similar reasons in conflict with the Robinson-Patman Act. It

is a strained argument to make, as plaintiffs do, that there must be "free competition" in liquor at the risk of violation of the Sherman Act; and it is almost equally strange to say that because New York tries to correct an evil in the sale of liquor by providing price criteria operative here, it "will impair the successful operation of alcoholic beverage control in other states".

Plaintiffs also attack the validity of portions of section 7 of the 1964 statute which require that filed price schedules show the bottle and case price paid by a retailer; and the portion of the section which prohibits sale or purchase by a wholesaler unless schedules are filed by brand owners "irrespective of the place of sale or delivery".

It is said by appellants that those requirements "can only mean" that sales by brand owners "in every state" must be filed with the New York authority.

The statute is concerned with New York practices and if the sales in other states have no relevancy to New York enforcement, the statute permits the Liquor Authority for good cause to waive the general prohibition against sales to wholesalers in the absence of such schedules. It would be reasonable to expect that the statute would be administered consistently with its sole purpose to regulate the intra-state sale of liquor.

Throughout the argument of plaintiffs on constitutional and other issues, runs the thread of their contention that the 1964 statute is not suited to the promotion of temperance and hence the main justification of a valid regulation of liquor is lost.

In summarizing their position in a reply brief plaintiffs say: "At issue here is whether Section 9 of Chapter 531 affirmatively promotes temperance". As to what best pro-

motes temperance among the people of New York it seems preferable to take the opinion of the Governor and the Legislature rather than that of the liquor industry.

The order should be affirmed with costs.

DESMOND, CH. J. (dissenting) :

Of plaintiffs' several serious and impressive arguments against the validity of sections 7 and 9 of chapter 531 of the Laws of 1964, one remains unanswered and to my mind unanswerable. It comes down to this: mandatory establishing of minimum prices for sales by bottle or case of "brand name" alcoholic beverages is beyond the power of our State Legislation, is an unconstitutional (U. S. Const., 5th and 14th Amendment; N. Y. Const., art. I, § 6) taking of private property without due process or compensation, and is not justified as a police power exercise since it is not necessary for or related to the health, safety, morals or welfare of the State's inhabitants or required by any emergency. Bringing New York State liquor prices into line with those of comparable localities may accord with general ideas of fairness, and our people may have cause to complain about marketing and pricing practices of plaintiffs which are said to result in the charging of premium prices in the package stores of New York State. But we are talking now about constitutional protections against arbitrary interferences by government with free price markets. Statutory price controls on food, housing accommodations or other essentials of life is a valid exercise of the State's far-ranging police power which is born out of public needs (*Nebbia v. New York*, 291 U. S. 502, 525 *et seq.*). Those items are regulated as to price because they are among the "great public needs"

referred to in *People v. Nebbia* (262 N. Y. 259, 270). But even the police power is limitable and the courts have the same duty to nullify unconstitutional legislative acts as to uphold statutes which satisfy or tend to satisfy or may reasonably be expected to satisfy some health, safety or welfare need. If no such relevance is discoverable, a statute infringing on the constitutionally protected rights of private property in price-fixing or similar restraints must fall (*Defiance Milk Products Co. v. DuMond*, 309 N. Y. 537; *Trio Corp. v. City*, 2 N. Y. 2d 690; *Loblaw Inc. v. State Board*, 11 N. Y. 2d 102). In each of those three cases we held a statute violative of due process because it needless-ly and arbitrarily forbade an otherwise valid business practice.

No one will question the traditional rights of the States (taken away by the Eighteenth Amendment but restored by the Twenty-first) under their inherent police power to prohibit, restrain or regulate the manufacture, sale and use of intoxicants (*Calvary Church v. State Liquor Authority*, 245 App. Div. 176, 178, affd. 270 N. Y. 497; *Mahoney v. Triner*, 304 U. S. 401). The New York Legislature has power to enact a variety of laws calculated to suppress intemperance or to minimize the known evils of the liquor traffic, since the trade is one as to which there is a recognized public interest. But "police power" is not a magic incantation to frighten off judicial investigation into the constitutionality of statutes. The State of New York could completely outlaw the sale of liquor but, having chosen instead to regulate it, the restrictions and requirements can be such only as are necessary to protect public safety, health and morals from the evils, known or apprehended, of the trade. The State's licensees may be subjected to the strictest supervision and control (as

scores of appellate court decisions in this State attest) but such supervision and control must at least tend to preserve public order and discourage the intemperate use of alcohol. No one has yet told us how any of these lawful purposes could be accomplished or furthered by forcing liquor prices down to the bottom level found anywhere in the United States. To promote temperance by making intoxicants cheaper is like trying to minimize the dangers of excessive smoking by abolishing cigarette taxes.

This statute cannot be saved by recourse to the familiar aphorisms about presuming a statute's constitutionality or presuming that investigation has shown necessity, or avoiding the substitution of a court's judgment for a Legislature's, or the like. Those who attack a price-fixing law have the burden of showing its unconstitutionality beyond any reasonable doubt (*Lincoln v. Barr*, 1 N. Y. 2d 413) but that burden is met when the attackers show as they do here that the only reason suggested or available for its enactment—that is, eliminating "price discrimination" against our State's residents has no relationship to any public need or evil of the kind which justifies use of the police power (*Defiance Milk Products Co. v. DuMond*, 309 N. Y. 537, 540-541, *supra*). Indeed, in section 8 of those 1964 amendments to section 101-b of the Alcoholic Beverage Control Law, the Legislature has forthrightly told us that its purpose and interest was solely to reduce the prices charged for brand-name liquor in this State. That was a long retreat from the old announced policy (see old section 101-c as enacted in 1950) of promoting temperance by eliminating price wars, by prohibiting sales below announced minima and by mandating resale price maintenance. It is a non-sequitur that since artificially jacking up the prices under earlier statutes did not promote tem-

perance, forcing them down to the lowest levels in the whole country will be a step toward moderation in use.

It is suggested that we should respect and accept the judgment of the Legislature and the Governor that price limitation will further temperance. But the assumption against the fact that such was the purpose runs against the declared fact. Neither the Governor nor the Legislature ever offered such a vain argument, and we must remember that sections 7 and 9 were not among the recommendations of the distinguished Moreland Act Commissioners appointed by the Governor. Temperance is a laudable objective and a proper State purpose but no one has the temerity to assert that cut-price liquor cuts down drinking. Therefore, it follows of absolute necessity that these amendments have nothing to do with the State policy written into section 2 of the State Alcoholic Beverage Control Law right after repeal of National Prohibition: "to regulate and control the manufacture, sale and distribution within the State of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for an obedience to law."

Even if these statutes could survive Federal constitutionality tests they are void for arbitrariness under our own decisions such as *Defiance Milk Products Co. v. DuMond*, 309 N. Y. 537, *supra*; *Trio Corp. v. City*, 2 N. Y. 2d 690; *Grove Hill Co. v. Ferncliff Cemetery Assn.*, 7 N. Y. 2d 403, 410; and *Loblaw Inc. v. State Board*, 11 N. Y. 2d 102. Police power statutes under the New York State Constitution are valid only if the legislation is addressed to a legitimate end and, also, if the measures taken are reasonable and appropriate to that end (*Matter of Title & Mtge. Guar. Co.*, 264 N. Y. 69, 83)—that is, such a statute must be "reasonably related and applied to some actual

and manifest evil." (*Defiance Milk Products Co. v. Du-Mond, supra*; *Twentieth Century v. Waldman*, 294 N. Y. 571, 580, appeal dismissed 326 U. S. 697; *East New York v. Hahn*, 293 N. Y. 622, 627, affd. 326 U. S. 230; *Department of Buildings v. City*, 14 N. Y. 2d 294, 297). The only "evil" against which this legislation is directed is found, apparently, in the fact that some people somewhere in this country under other unknown and uninvestigated conditions buy liquor more cheaply than we do. If this be good law, similar statutes may be passed as to any sale-licensed commodity.

I do not, although failing to discuss them at length, overlook a number of other troublesome aspects of these amendments. These difficulties may be summed up by the statement that it is wholly arbitrary to force New York State liquor prices down to the lowest level prevailing anywhere in America, despite higher license fees charged in this State, despite higher wages and salaries here (and conversely a small volume of sales by some of the distributors-plaintiffs), despite the fact that abnormally low prices somewhere in the country may be due to temporary conditions totally unrelated to New York State prices, and despite the predictable and remarkable result that the distillers now may (or must) raise prices elsewhere in order to reap even a better harvest in the enormous New York State market.

The judgment should be reversed and judgment directed for plaintiffs as demanded in the complaint, with costs in all courts.

* * *

Order affirmed, with costs. Opinion by Bergan, J. All concur except Desmond, Ch. J., who dissents and votes to

reverse in an opinion in which Fuld and Burke, JJ., concur.

Appendix B

OPINION OF SUPREME COURT—APPELLATE DIVISION

THIRD JUDICIAL DEPARTMENT

May 13, 1965.

JOSEPH E. SEAGRAM & SONS, INC. *et al.*,
Appellants,

v.

DONALD S. HOSTETTER *et al.*, Constituting the State
Liquor Authority, and LOUIS J. LEFKOWITZ, At-
torney General of the State of New York,

Respondents.

Per Curiam.

APPEAL (1) from so much of an order of the Supreme Court at Special Term as denied plaintiff's motion for a preliminary injunction and granted defendants' cross motion for summary judgment awarding declaratory judgment, as demanded in the counterclaim, that certain acts amendatory of the Alcoholic Beverage Control Law are constitutional and otherwise valid, and (2) from the judgment entered upon said order. (Opinion: ____ Misc. 2d ____.) MOTION for a temporary restraining order.

The action is brought by distillers, importers and whole-
salers of liquor sold in New York for judgment (1) de-

claring that the provisions of section 9 of chapter 531 of the Laws of 1964, amending subdivision 3 of section 101-b of the Aleoholic Beverage Control Law, and certain of the provisions of section 7 of said chapter, amending paragraph (a) of subdivision 3 of section 101-b of the same act, are invalid as violative of the commerce and supremacy clauses of the Constitution of the United States (U. S. Const., art. 1, § 8, cl. 3; art. VI, cl. 2) and as violative, also, of the due process and equal protection clauses of the Constitutions of the United States and the State of New York (U. S. Const., 14th Amdt., § 2; N. Y. Const., art. I, §§ 6, 11), and (2) enjoining the imposition of penalties for failure of compliance with such allegedly invalid provisions.

Appellants' many-pronged attack is directed principally to the provisions requiring, in substance, that each distiller and wholesaler offer New York purchasers in respect of each brand sold by him a price no higher than the lowest price at which such item was sold elsewhere in the United States as shown by schedules and affirmations required to be filed by him.

The case thus involves important constitutional questions respecting legislation of social consequence and of wide application; it is well and thoroughly briefed and is presented upon an adequate record; it will, most likely, be further reviewed; and under all these circumstances we deem it the function of this intermediate appellate court to reach its determination promptly and to state it succinctly and without elaboration.

The legislative policy sought to be effectuated by the amendments in dispute was declared to be, among other things, to foster price competition, to eliminate dis-

crimination against New York consumers and "to forestall possible monopolistic and anti-competitive practices designed to frustrate the elimination of such discrimination", price discrimination and favoritism being found "contrary to the best interests and welfare of the people of this state". (L. 1964, ch. 531, § 8.)

Neither in the record nor in appellants' argument do we find a substantial basis for the assertion that equal protection has been denied. In the light of the legislative history and studies and, so far as applicable, the studies and reports of the Moreland Act Commission, and upon our finding that the strong supportive presumptions have not been overcome, we conclude that the enactment constitutes a valid exercise of the police power and effects no deprivation of due process.

Appellants argue forcefully that the maximum price provisions of the amendments contravene the Robinson-Patman Act (U. S. Code. tit. 15, §§ 13 *et seq.*) and the Sherman Act (U. S. Code, tit. 15, §§ 1-7), and thus are violative of the supremacy clause and that the challenged amendments offend the commerce clause as well. The complete answer is, we believe, that the legislation lies well within the area of liquor traffic regulation in which, under the Federal Constitution, effective control may be exercised by the States. (U. S. Const., 21st Amdt., § 2; *State Bd. of Equalization v. Young's Market Co.*, 299 U. S. 59; *Mahoney v. Joseph Triner Corp.*, 304 U. S. 401; *Indianapolis Brewing Co. v. Liquor Control Comm.*, 305 U. S. 391; *Finch & Co. v. McKittrick*, 305 U. S. 395.) The later authorities, upon which appellants principally rely (see, e.g., *United States v. Frankfort Distilleries*, 324 U. S. 293; *Hostetter v. Idlewild Bon Voyage Liq. Corp.*, 377 U. S. 324; *Department of Revenue v. James B. Beam Distilling Co.*, 377 U. S. 341),

seem readily distinguishable from the older cases, above cited, and from the case before us. In *Frankfort* was involved a criminal prosecution, which the Court held (p. 299) was not barred by the 21st Amendment, which "has not given the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries"; and the Court was careful to point out (p. 299) that the Sherman Act "is not being enforced in this case in such manner as to conflict with the law of Colorado." Unlike the case before us, neither *Idlewild* nor *Beam* concerned an attempt by a State to exert *internal* control, within the ambit of the 21st Amendment, but, rather, involved taxing procedures long recognized as illegal.

Appellants' remaining contentions seem to us unsubstantial and do not require discussion.

Judgment affirmed, with costs. Motion for temporary restraining order denied, without costs. Application for permission to appeal to the Court of Appeals granted, without costs.

Gibson, P. J., Herlihy, Taylor, Aulisi and Hamm, JJ., concur.

Appendix C

OPINION OF JUDGE STALEY SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF ALBANY

JOSEPH E. SEAGRAM & SONS INC., THE HOUSE OF SEAGRAM, INC., STITZEL-WELLER DISTILLERY, INC., THE PADDINGTON CORPORATION, HIRAM WALKER INCORPORATED, GOODERHAM & WORTS LIMITED, JAS. BARCLAY & CO., LIMITED, W. A. TAYLOR & COMPANY, HIRAM WALKER DISTRIBUTORS, INC., THE AMERICAN DISTILLING COMPANY, McCORMICK DISTILLING COMPANY, THE FLEISCHMANN DISTILLING CORPORATION, MR. BOSTON DISTILLER INC., THE VIKING DISTILLERY, INC., JAMES B. BEAM DISTILLING COMPANY, JAMES B. BEAM IMPORT CORPORATION, SCHENLEY INDUSTRIES, INC., AFFILIATED DISTILLERS BRANDS CORP., KNICKERBOCKER LIQUORS CORP., BARTON DISTILLING COMPANY, BARTON DISTILLERS IMPORT CORPORATION, JULIUS WILE SONS & COMPANY, INC., BACARDI IMPORTS, INC., AUSTIN NICHOLS & COMPANY, INC., CANADA DRY CORPORATION, HEUBLEIN INC., McKESSON & ROBBINS, INC., NATIONAL DISTILLERS AND CHEMICAL CORPORATION, PUBLICKER DISTILLERS PRODUCTS, INC., WAYNE LIQUOR CORP., BROWN-FORMAN DISTILLERS CORPORATION, GLENMORE DISTILLERIES COMPANY, A. SMITH BOWMAN DISTILLERY INC., "2;" BRANDS, INC., STAR HILL DISTILLING COMPANY, SCHIEFFELIN & COMPANY, ALPINE WINE & LIQUOR CORP., BEN PERLOW LIQUOR CORP., BISON LIQUOR CO., INC., BLUE CREST WINE AND SPIRIT CORP., BONNY DISTRIBUTING CO., INC., CAPITAL DISTRIBUTORS CORP., CARDINAL DISTRIBUTORS INC., COLONY LIQUOR DISTRIBUTORS, INC., DISTILLED BRANDS, INC., EBER BROS. WINE & LIQUOR CORP., ELMIRA TOBACCO CO., INC., EMPIRE LIQUOR CORP., GRAVES & RODGERS, INC., M. LICHTMAN & CO., INC., MAJOR LIQUOR DISTRIBUTORS INC., MONARCH LIQUOR CORP., MULLEN & GUNN, INC., PEERLESS IMPORTERS CORP., RAMAPO WINE & LIQUOR CORPORATION, ROCHESTER LIQUOR CORPORATION, RODGERS LIQUOR CO., INC., S & K WINE & LIQUOR CORP., STANDARD FOOD PRODUCTS CORP., STANDARD WINE & LIQUOR CO., INC., STAR INDUSTRIES INC., UNIVERSAL LIQUOR CORP.,

Plaintiffs,

against

DONALD S. HOSTETTER, Chairman, JOHN C. HART, WILLIAM H. MORGAN, BENJAMIN H. BALCOM, ROBERT E. DOYLE, constituting the State Liquor Authority, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants.

Supreme Court, Albany County Special Term, December 28, 1964, Calendar #10-241.

Justice Ellis J. Staley, Jr., presiding.

Appearances:

Lord, Day & Lord, Esqs., Attorneys for Plaintiffs, 25 Broadway, New York 4, New York.

Louis J. Lefkowitz, Attorney General, Attorney for Defendants, The Capitol, Albany, New York 12224.

STALEY, JR., J.:

This is a motion for an order restraining the defendants pending the determination of the issues in this action from:

1. Requiring plaintiffs to comply in any manner with any part of section 9, ch. 531 of the Laws of 1964.
2. Requiring those plaintiffs who sell their brands of liquor to wholesalers located in other states as well as to wholesalers in the State of New York to file a schedule of prices at which such liquor is sold to wholesalers in states other than New York "irrespective of the place of sale or delivery" as required by section 7, ch. 531 of the Laws of 1964.
3. Requiring plaintiffs to include in their schedule of prices filed pursuant to section 101-b of the Alcoholic Beverage Control Law the "net bottle and case price paid by seller" as required by section 7, ch. 531 of the Law of 1964.

A cross motion is made by the defendants for an order dismissing the complaint herein or, in the alternative, for judgment declaring section 9 of ch. 531 of the Laws of 1964 and section 7, subdv. 3 (a) of ch. 531 of the Laws of 1964 to be in all respects constitutional and valid. Section 7 and section 9, as herein referred to, in each instance shall mean section 7 and section 9 of ch. 531 of the laws of 1964.

Section 9 added new paragraphs (d), (e), (f), (g), (h), (i), (j) and (k) to subdv. 3 of section 101-b of the Alcoholic Beverage Control Law. Section 7 enacted certain amendments to subdvs. 2, 3, and 4 of section 101-b and added new subdv. 6 to said section.

The provisions of section 7 require monthly schedules of brand owners', distillers' or manufacturers' bottle and case prices and discounts to wholesalers, as well as the net bottle and case price paid by the seller and of wholesalers' prices and discounts to retailers. The sale of liquor or wine to or by a wholesaler or retailer is prohibited unless the required schedules are filed and, in the case of a wholesaler, such prohibition applies irrespective of the place of sale or delivery. Schedules are not required to be filed for an item under a brand owned exclusively by one retailer and sold at retail within the state exclusively by such retailer.

Discrimination in price or discounts and the granting of discounts other than as provided in the section is declared to be unlawful. Penalties are also provided for making any sale or purchase in violation of the provisions of the section or for making a false statement in any schedule or for failing or refusing to comply with the provisions of the section.

In essence section 9 requires that, in addition to the schedules required by section 7, there must be filed an affirmation by the brand owner, or by the wholesaler designated as agent for the purpose of filing the schedule if the owner of the brand is not licensed by the liquor authority that the bottle and case price of liquor to wholesalers set forth in the schedule is no higher than the lowest price at which such item was sold by such brand owner or such wholesaler or any related person to any

wholesaler anywhere in any other State of the United States or in the District of Columbia or to any state which owns and operates retail liquor stores in the month immediately preceding the month in which the schedule is filed. A similar affirmation is required concerning sale to retailers. In the event an affirmation is not filed with respect to an item of liquor the schedule for which the affirmation is required is deemed invalid and such item may not be sold to or purchased by a wholesaler during the period covered by the schedule. Provision is made for determining the lowest price for which any item was sold elsewhere and the making of a false statement in an affirmation is declared to be a misdemeanor.

The intent of the Legislature in making these amendments is set forth in section 8 which provides as follows:

"In enacting section eleven of this act, it is the firm intention of the legislature (a) that fundamental principles of price competition should prevail in the manufacture, sale and distribution of liquor in this state, (b) that consumers of alcoholic beverages in this state should not be discriminated against or disadvantaged by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states, and that price discrimination and favoritism are contrary to the best interests and welfare of the people of this state, and (c) that enactment of section eleven of this act will provide a basis for eliminating such discrimination against and disadvantage of consumers in this state. In order to forestall possible monopolistic and anti-competitive practices designed to frustrate the elimination of such discrimination and disadvantage, it is hereby further declared that the sale of liquor should be subjected to certain further restrictions,

prohibitions and regulations, and the necessity for the enactment of the provisions of section nine of this act is, therefore, declared as a matter of legislative determination."

The first two causes of action of the complaint seek a declaratory judgment determining (1) that section 9 is unconstitutional and void in that it deprives the plaintiffs named in the first cause of action of liberty and property without due process of law; it is an arbitrary, capricious and unreasonable exercise of the state's police power; is inconsistent with the declared policy of the Alcoholic Beverage Control Law as expressed in sections 2 and 101-b (1) of that law; it will not serve to cure the possibility of monopolistic and anti-competitive practices; it contravenes the terms and policy of the Sherman Act, 15 U. S. C. sections 1-7; it is in direct conflict with the Robinson-Patman Act, 15 U. S. C., sections 13(a), 13(b), and 21(a); it violates the Constitution of the United States by interfering with commerce among the states; it violates the Constitution of the State of New York and the Constitution of the United States in that it is discriminatory; (2) that section 7, Subdv. 3(a) is unconstitutional and void in that it violates the Constitution of the United States by interfering with commerce among the states and with foreign commerce and deprives the plaintiffs of property without due process of law; (3) that section 9(f) violates the Constitution of the State of New York and the Constitution of the United States in that it deprives the plaintiff named in the second cause of action of liberty and property without due process of law; it is an arbitrary, capricious and unreasonable exercise of the state's police power; it is likely to cause unwitting violations of the laws of New York and of other states and of the federal anti-trust laws; it is vague and indefinite.

The third and fourth causes of action of the complaint seek an injunction enjoining and restraining the defendants and their successors from imposing any sanctions or penalties for failure to submit the affirmations and verifications required by section 9 and for failure to file the prices and schedules required to be filed by section 7 on the ground that said sections are unconstitutional and void.

The cross motion by the defendants for judgment declaring section 9 and section 7, subdv. 3(a) to be, in all respects, constitutional and valid is, in effect, a motion for summary judgment.

In weighing a challenge of unconstitutionality of a statute the Courts observe the legal principles; that a legislative enactment carries with it an exceedingly strong presumption of constitutionality; that every intendment is in favor of the statute's validity; that the heavy burden of demonstrating unconstitutionality beyond a reasonable doubt rests upon the one who attacks a statute as unconstitutional and that only as a last unavoidable result do Courts strike down a legislative enactment as unconstitutional. (*I. L. F. Y. Co. v. Temporary State Rent Comm.*, 10 N. Y. 2d 263; *Wiggins v. Town of Somers*, 4 N. Y. 2d 215; *Lincoln Bldg. Assoc. v. Barr*, 1 N. Y. 2d 413; *New York State Thruway Authority v. Ashley Motor Court*, 12 A. D. 2d 223, affd. 10 N. Y. 2d 151; *Matter of Roosevelt Raceway Inc. v. Monaghan*, 9 N. Y. 2d 293; *Matter of Ahern v. South Buffalo Ry. Co.*, 303 N. Y. 545, affd. 344 U. S. 367; *Martin v. State Liquor Authority*, 43 Misc. 2d 682, affd. 15 N. Y. 2d 707.)

The judgment of the Courts will not be substituted for that of the Legislature to determine whether the legislation will accomplish the desired end or can be effectively administered.

(5)

Courts no longer employ the due process clause of the Constitution to invalidate State Laws regulatory of business and industrial conditions merely because such laws are deemed unwise or improvident. (*Williamson v. Lee Optical Co.*, 348 U. S. 483; *Gail Turner Nurses Agency, Inc. v. State of New York*, 17 Misc. 2d 273.)

Nor will the Court sit as a superlegislature to weigh the wisdom of each enactment brought before it, or decide whether policy which it expresses offends the welfare of a particular group. (*Day-Brite Light, Inc. v. Missouri*, 342 U. S. 421; *Gail Turner Agency v. State of New York*, *supra*.)

Nor are legislative enactments rendered invalid as a denial of due process or equal protection under the law because they impose financial hardship, result in reduced income or make it impossible for some to continue in a particular business. (*California Automobile Assn. v. Maloney*, 341 U. S. 105; *Breard v. Alexandria*, 341 U. S. 622; *Day-Brite Light, Inc. v. Missouri*, *supra*; *Gail Turner Agency v. State of New York*, *supra*.)

The Legislature is also presumed to have investigated the subject matter of the statute and found facts to support the legislation. (*Martin v. State Liquor Authority*, *supra*.) In this instance the Legislature, in addition, had before it, when it enacted ch. 531 of the Laws of 1964, the Study Papers and Reports of the Moreland Commission. Being an enactment under the police power of the state, the strongest presumption of validity attaches to ch. 531 of the Laws of 1964 and the fact that it causes or might cause an economic hardship to those whom it affects is no argument against its constitutional validity, if it is an otherwise valid exercise of the state's police power. (*N. H. Lyons & Co., Inc. v. Corsi*, 3 N. Y. 2d 60.)

Plaintiffs' attack ch. 531 on the basis that it deprives them of liberty and property without due process of law in violation of the Constitutions of the State of New York and of the United States is contained in paragraphs 53, 90 and 91 of their complaint. In essence these paragraphs allege economic hardships, possible reduced profit margins, expenditures for new equipment, possible difficulty in increasing prices and difficulty in competing in other states. These allegations, even if proven, have no bearing on the constitutionality of the statute. (*California Automobile Assn. v. Maloney, supra; Breard v. Alexandria, supra; Day-Brite Light, Inc. v. Missouri, supra; Gail Turner Agency v. State, supra.*)

Paragraphs 54, 90 and 94 of the plaintiffs' complaint allege that section 9 is an arbitrary, capricious and unreasonable exercise of the state's police power in that the term related person as defined in section 9 is vague; plaintiffs have no power to compel related persons to furnish them with information; price differentials are limited to state gallonage taxes or fees; it is impossible for plaintiffs to determine in any given month the prices at which brands sold by them in New York are sold to wholesalers and/or retailers throughout the United States and the District of Columbia; it is impossible for plaintiffs to determine what is meant by inducements of any kind whatsoever.

The choice of measures is for the Legislature who are presumed to have investigated the subject and to have acted with reason not from caprice. "Legislation passed in the exercise of the police power must be reasonable in the sense that it must be based on reason as distinct from being wholly arbitrary or capricious, but when the legislature has power to legislate on a subject, the courts may only look into its enactment far enough to see whether it

is in any view adapted to the end intended. If it is, the court must give it effect, however unwise they may regard it, or however much they might, if given the choice, prefer some other measure as more fit and appropriate." (*People v. Griswold*, 213 N. Y. 92.)

The provisions of ch. 531 requiring filing price schedules and affirmations is not, in of itself, either arbitrary or unreasonable. Such filings are certainly appropriate to the purpose intended of preventing consumers in New York State from being discriminated against or disadvantaged by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states. The fact that the plaintiffs might find it difficult to obtain the required information or are limited by the act in the price differentials allowed, does not make the act arbitrary, capricious and unreasonable.

Plaintiffs' allegations concerning the vagueness of the terms "related person" and "inducements of any kind whatever" are equally without merit. Subdivision 4 of section 7 provides that "The liquor authority may make such rules as shall be appropriate to carry out the purpose of this section." The section referred to is section 101-b of the Alcoholic Beverage Control Law.

The Legislature may and in many cases has enacted statutes in broad outline, leaving to administrative officials enforcing them the duty of arranging the details. (*Matter of National Surety Co.*, 239 App. Div. 490, affd. 264 N. Y. 473; *Matter of People [International Workers Order]*, 199 Misc. 941, affd. 280 App. Div. 517, affd. 305 N. Y. 258; *Martin v. State Liquor Authority, supra*.) The Legislature often delegates to an executive officer the power to determine facts and conditions upon which the operation of a statute depends. This delegation of power relates to

the execution of the law rather than to the making of the law. There is no valid objection to such a delegation of power. (*Tropp v. Knickerbocker Village, Inc.*, 205 Misc. 200, affd. 284, App. Div. 935; *Martin v. State Liquor Authority, supra.*)

Plaintiffs' contentions that section 9 is inconsistent with the declared policy of the Alcoholic Beverage Control Law to promote temperance and that section 9 will not serve to cure the possibility of monopolistic and anti-competitive practices at which it is directed are equally insufficient to prove invalidity of the statute.

Paragraphs 57, 58 and 59 of the plaintiffs' complaint consist of allegations that section 9 contravenes the terms and policy of the Sherman Act, 15 U. S. C. sections 1 through 7 and is in direct conflict with the Robinson-Patman Act, 15 U. S. C., sections 13(a), 13(b) and 21(a) and, therefore, must yield to the supremacy of such laws as required by Article VI of the Constitution of the United States.

Paragraph 60 of the plaintiffs' complaint consists of an allegation that section 9 violates the Constitution of the United States by interfering with commerce among the states.

There is no doubt that under the twenty-first amendment of the Constitution of the United States that the State of New York may not only regulate, but may completely prohibit the importation of some or all intoxicants destined for use or consumption within its borders and may also restrict, prevent, regulate and control by taxation or otherwise, the distribution, use or consumption of intoxicants within the state. (*California v. Washington*, 358 U. S. 64; *Department of Revenue v. James B. Beam*

Distilling Co., 377 U. S. 341; *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324.)

The Alcoholic Beverage Control Law of the State of New York concerns itself solely with the regulation and control of the manufacture, sale and distribution within the State of New York of alcoholic beverages. (Alcoholic Beverage Control Law, section 2.) Any effect which it has on interstate commerce is entirely co- incidental. The regulation and control of the sale and distribution of alcoholic beverages is a matter of local concern and the mere fact that such regulations have or may have some repercussions upon the activities of a business which operates nationwide does not invalidate the state action, particularly where the subject of the action is within the police power of the state. (*Osborn v. Ozlin*, 310 U. S. 53; *Southern Pacific Co. v. Arizona*, 325 U. S. 761; *Watson v. Employers Liability Corp.*, 348 U. S 66.)

On the other hand the commerce clause of the United States Constitution, the Sherman Act and the Robinson-Patman Act are all concerned with interstate commerce as distinguished from intrastate commerce. Since the purpose of the Alcoholic Beverage Control Law is to regulate and control the intrastate sale and distribution of alcoholic beverages, it does not come within the realm of the commerce clause of the United States Constitution nor of the Sherman Act or of the Robinson-Patman Act.

Paragraph 61 of the plaintiffs' complaint consists of an allegation that section 9 violates the Constitution of the State of New York by discriminately imposing maximum price limitations upon sales made by persons dealing in liquor sold under "private labels" and sales made by vintners and wholesalers of wine.

"The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." (*Tigner v. Texas*, 310 U. S. 141.) The fact that the Legislature omitted certain ones who might have been included in the statute, does not render it unconstitutional. (*New York Rapid Transit Corp. v. City of New York*, 275 N. Y. 258; *People v. Charles Schweinler Press*, 214 N. Y. 395; *National Psychological Assoc. v. University of State of New York*, 8 N. Y. 2d 197.)

"So long as there is some real difference in the situation, interests and capacity of different classes of citizens, this may be the basis of legislative classification which has a real and reasonable relationship to the difference which thus exists." (*People v. Klinck Packing Co.*, 214 N. Y. 121.)

The Legislature is also presumed to have investigated the subject matter of the legislation and based upon said investigation determined that a different classification should exist for brand owners, private brands and vintners.

Paragraph 63 of the plaintiffs' complaint consists of an allegation that paragraph 3(a) of section 7 violates the Constitution of the United States by requiring schedules for sales "irrespective of the place of sale or delivery" thereby interfering with commerce among the states and with foreign commerce and that the requirement of such schedules to contain the "net bottle and case price paid by the seller" deprives plaintiffs of property without due process of law and is an arbitrary, capricious and unreasonable exercise of the state's police power.

The fallacy of this allegation is in the fact that the plaintiffs fail to take into consideration the purpose of section

7 as is set forth in subdv. (1) thereof and also fail to take into consideration the saving clause or provision in subdv. 3(a).

Subdivision one provides: "It is the declared policy of the state that it is necessary to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages * * *." This language sets forth words of limitation and limits the applicability of the law to regulation and control within the state.

Subdivision 3(a) which contains the words "irrespective of the place of sale and delivery" also contains a savings clause which provides as follows: "Such brand of liquor or wine shall not be sold to wholesalers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter."

Thus a licensee may purchase liquor for reasons not inconsistent with the purpose of this chapter upon obtaining prior written permission of the authority. It goes without saying that a purchase or sale to a wholesaler for sale or distribution in interstate or foreign commerce would be a purpose not inconsistent with this chapter. The requirement that a licensee obtain prior permission to make such purchases or sales is not such a burden on interstate commerce as to render it invalid under the Commerce Clause of the United States Constitution, particularly when it is taken into consideration; that the term "wholesaler" means licensed wholesaler (section 3, subdv. 35 of the Alcoholic Beverage Control Law) that section 62 of said law permits a licensed wholesaler "to sell and deliver to persons outside the state pursuant to the laws of the place of sale and delivery"; that the state has the power to require its licen-

sees to make all reports which it deems necessary to be made by any licensee (section 17, subdiv. 8 of the Alcoholic Beverage Control Law; amendment 21, United States Constitution) and that the state and the Liquor Authority have the right and power to refuse to issue any license or permit provided for in the Alcoholic Beverage Control Law.

Plaintiffs' allegation in this paragraph of their complaint of a violation of due process stands in no better position than their similar allegations in paragraphs 54, 90 and 94 of their complaint. The allegation that the requirement that "net bottle and case price paid by the seller" in no way serves to carry out the policy of the Alcoholic Beverage Control Law is a mere conclusion not supported by fact.

Further, the information would appear to have some value in determining whether the fundamental principles of price competition prevails in the industry and in determining whether unjustifiable prices are being charged to consumer in the state. Thus, this part of the legislation appears to be adapted to the end intended by section 8 of ch. 531. The Court must, therefore, give it effect. (*People v. Griswold, supra.*)

It, thus, clearly appears that the plaintiffs have failed to sustain the burden of demonstrating the unconstitutionality beyond a reasonable doubt. It is, therefore, the opinion of the Court that the sections in question are constitutional. There being no clear question of fact presented here, declaratory judgment may be appropriately directed. (*Martin v. State Liquor Authority, supra.*)

The motion to dismiss the complaint is denied and judgment is directed in favor of the defendant declaring section

9 and section 7 subdiv. 3(a) of ch. 531 of the Laws of 1964 to be, in all respects, constitutional and valid.

Plaintiffs' application for a preliminary injunction is denied.

Attorney for defendants to submit order.

All papers to the attorney for defendants for filing upon entry of the order herein.

Appendix D

TEXT OF SECTIONS 7, 8 AND 9

Of

CHAPTER 531

Of The

LAWS OF 1964

§ 7. Section one hundred one-b of such law, as added by chapter eight hundred ninety-nine of the laws of nineteen hundred forty-two, subdivision four thereof having been amended by chapter five hundred fifty-one of the laws of nineteen hundred forty-eight, is hereby amended to read as follows:

§ 101-b. Unlawful discriminations prohibited; filing of schedules; schedule listing fund. 1. It is the declared policy of the state that it is necessary to regulate and control the manufacture, sale, and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate the undue stimulation of sales of alcoholic beverages and the practice of manufacturers and wholesalers in granting discounts, rebates, allowances, free goods, and other induce-

ments to selected licensees, which contribute to a disorderly distribution of alcoholic beverages, and which are detrimental to the proper regulation of the liquor industry and contrary to the interests of temperance, it is hereby further declared as the policy of the state that the sale of alcoholic beverages should be subjected to certain restrictions, prohibitions and regulations. The necessity for the enactment of the provisions of this section is, therefore, declared as a matter of legislative determination.

2. It shall be unlawful for any person who sells liquors or wines to wholesalers or retailers

(a) to discriminate, directly or indirectly, in price, in discounts for time of payment or in discounts on quantity of merchandise sold, between one wholesaler and another wholesaler, or between one retailer and another retailer purchasing liquor or wine bearing the same brand or trade name and of like age and quality; (b) to grant, directly or indirectly, any discount, rebate, free goods, allowance or other inducement of any kind whatsoever, except a discount not in excess of two per centum for quantity of liquor, a discount not in excess of five per centum for quantity of wine and a discount not in excess of one per centum for payment on or before ten days from date of shipment.

3. (a) No brand of liquor or wine shall be sold to or purchased by a wholesaler, irrespective of the place of sale or delivery, unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect. Such schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, and shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the number of bottles contained in each case, the bottle and case price

to wholesalers, the net bottle and case price paid by the seller, which prices, in each instance, shall be individual for each item and not in "combination" with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any. Such brand of liquor or wine shall not be sold to wholesalers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter. Such schedule shall be filed by (1) the owner of such brand, or (2) a wholesaler selling such brand and who is designated as agent for the purpose of filing such schedule if the owner of the brand is not licensed by the authority, or (3) with the approval of the authority, by a wholesaler, in the event that the owner of the brand is unable to file a schedule or designate an agent for such purpose.

(b) No brand of liquor or wine shall be sold to or purchased by a retailer unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect. Such schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, and shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the number of bottles contained in each case, the bottle and case price to retailers, the net bottle and case price paid by the seller, which prices, in each instance, shall be individual for each item and not in "combination" with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any. Such brand of liquor or wine shall not be sold to retailers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for

reasons not inconsistent with the purpose of this chapter. Such schedule shall be filed by each manufacturer selling such brand to retailers and by each wholesaler selling such brand to retailers.

(c) Provided however, nothing contained in this section shall require any manufacturer or wholesaler to list in any schedule to be filed pursuant to this section any item offered for sale to a retailer under a brand which is owned exclusively by one retailer and sold at retail within the state exclusively by such retailer.

4. Each such schedule shall be filed on or before the tenth day of each month on a date to be fixed by the authority, and the prices and discounts therein set forth shall become effective on the first day of the calendar month following the filing thereof and shall be in effect for such calendar month. Within ten days after the filing of such schedule the authority shall make them or a composite thereof available for inspection by licensees. Within three business days after such inspection is provided for, a wholesaler may amend his filed schedule for sales to retailers in order to meet lower competing prices and discounts for liquor or wine of the same brand or trade name, and of like age and quality, filed pursuant to this section by any licensee selling such brand, provided such amended prices are not lower and discounts are not greater than those to be met. Any amended schedule so filed shall become effective on the first day of the calendar month following the filing thereof and shall be in effect for such calendar month. All schedules filed shall be subject to public inspection, from the time that they are required to be made available for inspection by licensees, and shall not be considered confidential. Each manufacturer and wholesaler shall retain in his licensed premises for inspection by